

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID HIRSCH,

Defendant.

No. **CR01-3024 MWB**

**REPORT AND RECOMMENDATION  
ON MOTION TO SUPPRESS**

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***I. INTRODUCTION***

This matter is before the court on the motion of the defendant David Hirsch to suppress evidence. Hirsch filed his combined motion and brief on January 18, 2002 (Doc. No. 64). The plaintiff (the “Government”) filed a resistance on January 28, 2002 (Doc. No. 67). Hirsch submitted a supplemental brief on February 15, 2002 (Doc. No. 70). Pursuant to the trial scheduling and management order, the motion was assigned to the undersigned United States Magistrate Judge in accordance with 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition.

The court held a hearing on the motion on February 7, 2002. Assistant U.S. Attorney C.J. Williams appeared for the Government. Hirsch appeared in person with his attorney, Robert Tiefenthaler. The Government offered the testimony of John Phillip Graham, an agent with the Iowa Division of Narcotics Enforcement. Hirsch testified on his own behalf. The Government offered the following three exhibits, each of which was admitted without objection: Government Ex. 1, application for search warrant, endorsement, warrant, return, and evidence list (all attached as Ex. 1 to the Government’s resistance); Government Ex.

2, a laboratory receipt for certain items seized during the search; and Government Ex. 3, Iowa DNE Clandestine Laboratory Emergency Response Team list of items seized during the search.

The court has reviewed the parties' arguments and considered the evidence, and finds the motion is fully submitted and ready for decision.

## ***II. STATEMENT OF FACTS***

This case arises out of a search warrant issued on May 18, 2001, authorizing the search of a residence owned by Hirsch's codefendant David Vorland, and all vehicles and persons found on the property. The court previously has determined, in connection with a motion to suppress filed by Vorland, that the search warrant which is the subject of Hirsch's suppression motion lacked probable cause and was not valid. The court adopts its statement of facts and holding set forth in its Report and Recommendation filed September 18, 2001, in this case (Doc. No. 23). The court's statement of facts was adopted by Chief Judge Mark W. Bennett in his ruling on Vorland's motion (Doc. No. 31). The court will set forth such additional facts as may be relevant to a determination of Hirsch's motion to suppress.

Agent Graham testified he did not participate in the search, but was on the scene as coordinator and to secure the property. In that capacity, when he arrived at the scene, the agent walked around the Vorland property. He observed on the property a residence, a detached garage located north of the residence, a couple of other outbuildings also to the north of the residence, and several vehicles. When Agent Graham passed by a black GMC Jimmy<sup>1</sup> that was parked to the north of Vorland's residence, he detected the odor of ether. From his training and experience, Agent Graham knew ether is a substance used in the manufacture of methamphetamine. He looked through the passenger side window of the

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<sup>1</sup>The GMC Jimmy is registered to Hirsch.

vehicle and saw several coffee filters and some rubber gloves, which he knew were used in the manufacture of methamphetamine. Based on his training and experience, Agent Graham thought the GMC Jimmy might have been used to transport or store materials used to manufacture methamphetamine. He contacted an agent of the State Fire Marshal's Office who also was on the scene, and that officer entered and searched the vehicle, where he found items consistent with the manufacture of methamphetamine.

Hirsch testified the GMC Jimmy's windows are heavily-tinted with a "privacy" tint similar to that used on limousine windows. Hirsch stated it would not have been possible to simply look through the glass and see items inside the vehicle, unless the officer pressed his nose up against the glass.

The court does not find the officer's testimony and Hirsch's testimony to be significantly inconsistent. The court finds the glass was heavily tinted, but also finds the officer was drawn to the vehicle by the odor of ether, and then saw through the glass and detected the coffee filters and rubber gloves in plain view.

During the early minutes of the search, Hirsch was in Vorland's garage, working on a truck engine underneath the hood of the truck. Hirsch stood up and walked toward the rear of the truck, reaching for a cigarette in his pocket. At that time, he noticed officers standing outside the garage with guns drawn and pointed at him. The officers told him to come out of the garage and get on the ground. Hirsch complied, laying down on the gravel. The officers handcuffed Hirsch with his hands behind his back. They brought Vorland to the same location and handcuffed him, as well. Then the officers took both men around the corner of the house and had them sit on the tailgate of a pickup truck. Officer Tyler started going through Hirsch's pockets, and found a baggie containing approximately one gram of methamphetamine, \$295.00 in cash, and miscellaneous personal items. (See Ex. 1, Case Evidence List Report)

Hirsch seeks to suppress all evidence found in the GMC Jimmy and on his person. He argues the *Leon* exception<sup>2</sup>, which the court found applicable to the search of Vorland and Vorland's property, was not applicable to the searches of Hirsch's vehicle and his person, because the warrant was too vague for any reasonable officer to believe it was valid as to Hirsch.

The search warrant, in pertinent part, authorizes a search of "Any persons on property during warrant service," and "Any vehicles under control of Vorland or on property during warrant service. . . ."

### ***III. ANALYSIS***

The court previously found that although the search warrant was not supported by probable cause, nevertheless, the officers executing the search warrant reasonably and in good faith relied on the warrant in executing the search. Further, the court found the search warrant was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," citing *United States v. Leon*, 468 U.S. 897, 923, 104 S. Ct. 3405, 3421, 82 L. Ed. 2d 677 (1984). (Doc. No. 23, pp. 9-10) The *Leon* good faith exception would apply to the officers' search of all the vehicles found on Vorland's property. In addition, the "plain view" doctrine provided probable cause for a search of the GMC Jimmy.

As the Eighth Circuit Court of Appeals explained in *United States v. Reinholz*,

The "plain view" doctrine permits police to seize an item not specified in a search warrant if the police are lawfully in a position to observe the item and its incriminating character is immediately apparent.

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<sup>2</sup>*United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

*Reinholz*, 245 F.3d 765, 777 (8th Cir. 2001) (citing *Horton v. California*, 496 U.S. 128, 136-38, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990)). The officers' search of Hirsch's vehicle did not violate the Fourth Amendment because the officers were authorized to be on Vorland's property to execute the search warrant, the vehicle itself was in plain view, and the coffee filters and rubber gloves were immediately apparent inside the vehicle. Hirsch's motion to suppress should be **denied** with respect to the items seized from the GMC Jimmy.<sup>3</sup> See *Reinholz, supra*; see also *United States v. Weinbender*, 109 F.2d 1327, 1330 (8th Cir. 1997).

The only remaining issue is whether the officers executing the search warrant on Vorland's property had the right to search Hirsch under the warrant's broad authorization to search 'any persons' located on the property. The Government acknowledges that "a search warrant cannot constitutionally authorize officers to search 'any persons' on the premises of a residence during a search of the residence, unless the application supports probable cause to believe that any person present at the search would likely have evidence of criminal activity on their person." (Doc. No. 67, p. 6, citing *Ybarra v. Illinois*, 444 U.S. 85, 94 (1979)). However, the Government argues the *Leon* good faith exception applies to the officers' search of Hirsch.

In *Leon*, the United States Supreme Court explained that an "officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was

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<sup>3</sup>Hirsch's motion also seeks to suppress items seized from a Chevrolet Blazer owned by him that was on Vorland's property. The only evidence introduced at the hearing regarding the Blazer was that Hirsch was working on its engine at the time he first encountered the officers executing the search. In any event, the court finds the *Leon* good faith exception applicable to the officers' search of the Blazer.

properly issued.” *Leon*, 468 U.S. at 922-23, 104 S. Ct. at 3420 (citations and footnote omitted). As the United States Supreme Court noted in *Leon*:

It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a “bare bones” affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. [Citations omitted.]

*Id.*, 468 U.S. at 923 n.24, 104 S. Ct. at 3420 n.24.

Thus, if serious deficiencies exist either in the warrant application itself or in the magistrate’s probable cause determination, then the *Leon* good faith exception may not apply. “[R]eviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause.” *Leon*, 468 U.S. at 915, 104 S. Ct. at 3416 (internal citations omitted). Good faith on law enforcement’s part in executing a warrant “is not enough,” because “[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.” *Leon*, 468 U.S. at 915 n.13, 104 S. Ct. at 3417 n.13 (citing *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964), and *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 23 134 (1959)).

In the present case, the application for the search warrant contained nothing connecting Hirsch with the Vorland property or with the items found in the trash bags that led officers to Vorland. The court finds the officers could not reasonably and in good faith have relied on the warrant in their search of Hirsch’s person. The same is true for the overly broad, generalized authorization in the warrant for a search of “any person” found on the premises.

A valid warrant should describe the things to be taken and the place to be searched with particularity such that it provides a guide to the exercise of informed discretion for the officer executing the warrant. [Citation omitted.] The Fourth Amendment's prohibition of general warrants is to prevent an exploratory rummaging of a person's belongings. Acknowledging this purpose, in *United States v. Johnson*, 541 F.2d 1311 (8th Cir. 1976), this court observed that "[t]he underlying measure of adequacy in the description is whether given the specificity in the warrant, a violation of personal rights is likely." *Id.* at 1313.

*United States v. LeBron*, 729 F.2d 533, 536 (8th Cir. 1984). The lack of specificity in the warrant in question here made a violation of personal rights likely.

The court finds the officers' search of Hirsch's person did not fall within the *Leon* good faith exception, and violated Hirsch's Fourth Amendment rights. See *United States v. Clay*, 640 F.2d 157 (8th Cir. 1981) (search of person who knocked on door of house during search violated fourth Amendment). Hirsch's motion to suppress should, therefore, be **granted** as to the items seized from his person.<sup>4</sup>

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<sup>4</sup>The portion of the warrant authorizing a search of 'any persons' can be severed from the warrant without affecting the validity of the remainder. See *United States v. Fitzgerald*, 724 F.2d 633 (8th Cir. 1983) (*en banc*).

#### ***IV. CONCLUSION***

**IT IS RECOMMENDED**, unless any party files objections<sup>5</sup> to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that the defendants' motion to suppress evidence (Doc. No. 19) be **granted in part and denied in part**, in accordance with the court's recommendations set forth above.

**IT IS SO ORDERED.**

**DATED** this 20th day of February, 2002.

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PAUL A. ZOSS  
MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT

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<sup>5</sup>Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).